No. 91-2051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STATE OF SOUTH DAKOTA IN ITS OWN BEHALF, AND AS PARENS PATRIAE,
Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN OF THE CHEYENNE RIVER SIOUX TRIBE AND DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR OF CHEYENNE RIVER SIOUX TRIBE GAME, FISH AND PARKS,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

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BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The International Association of Fish and Wildlife Agencies, having obtained written consent of all parties to the case as required by Rule 37.2, submits this brief in support of the petition.

INTEREST OF AMICUS CURIAE

The International Association of Fish and Wildlife Agencies (hereinafter "the Association") is a District

of Columbia not-for-profit corporation dedicated to coordinating the efforts of public administrative agencies responsible for the protection and management of the fish and wildlife of North America. Founded at Yellowstone National Park in 1902, the Association numbers among its government members the fish and wildlife agencies of all fifty states.

The standard applied by the court of appeals to construe the Cheyenne River taking act defeats the intent of Congress by means of a rule which denies effect to the implications of the statute. Application of the *Bourland* standard within the Eighth Circuit could adversely affect state authority to regulate tribal nonmember hunting and fishing on thousands of acres of land taken for public flood control purposes in North Dakota and South Dakota. Such areas have been regarded as public areas open to hunting and fishing by nonmembers and subject to regulation by the state. In addition, application of the Eighth Circuit standard could unravel other native settlements enacted by Congress on which interested parties have come to rely.

SUMMARY OF ARGUMENT

1. Moving beyond the rule of liberal construction of ambiguous provisions to favor Indians, the court of appeals now declares that the implications of a congressional enactment restrictive of Indian treaty rights will be denied effect in the Eighth Circuit owing to the failure by Congress to state explicitly such implications. No standard enunciated by this Court declares that effect will be given to a congressional enactment only if congressional intent is explicitly stated. To the contrary, *Brendale v. Confederated*

Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989), and *Montana v. United States*, 450 U.S. 544 (1981), recognized that implicit in the alienation of lands under the Allotment Acts is the dissolution of tribal authority over land owned by nonmembers within the reservation. The court of appeals distinguished *Brendale* and *Montana* as decisions founded upon "the intent to destroy tribal government underlying the Allotment Acts," (Petitioner's Appendix at A27) (hereinafter Pet. App.), found no such intent in the Cheyenne River Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954), and proceeded to construe the settlement described in that act as if it were a law of general applicability. The court of appeals thus invoked the standard of *United States v. Dion*, 476 U.S. 734 (1986), a case involving prohibitions of general applicability, which requires clear evidence that Congress was aware of a conflict between its intended action and Indian treaty rights, and that Congress chose to resolve the conflict by abrogation. But the Cheyenne River Act is a law of special applicability to the tribe, and involves a "complete settlement of all claims, rights, and demands of said Tribe or allottees or heirs thereof arising out of the Oahe project." (Section II, Pet. App. at A197). While the *Dion* standard is an appropriate safeguard of Indian treaty rights against unintended dissolution by Congress in the context of the enactment of a law of general applicability, the application of the *Dion* standard to settlement legislation such as the Cheyenne River Act is not appropriate. Congress intended that Act to be a "complete settlement of all claims, rights, and demands," thereby obviating the need to itemize the constituent elements thereof. And where Congress intended that a particular tribal right con-

tinue, such as the right to hunt and fish within the taken area, Congress explicitly renewed it. (Section X, Pet. App. at A205).

2. Even *United States v. Dion*, 476 U.S. 734 (1986), does not require the precision demanded of Congress by the court of appeals. The court of appeals had before it the decision of the district court permanently enjoining tribal defendants from regulating hunting and fishing by nonmembers of the Cheyenne River Sioux Tribe on lands taken by the United States for flood control purposes. (Pet. App. at A2). Invoking *Dion*, the court of appeals proceeded to address the issue by examining the Cheyenne River Act, "to see if Congress clearly expressed an intent to divest the Tribe of regulatory authority over non-Indian hunting and fishing activity on the taken area." (Pet. App. at A27). But neither *Dion* nor any decision of this Court erects a standard so high that Congress will be deemed to have curtailed an Indian treaty right only if legislative language speaks to the precise issue. The Eighth Circuit standard effectively declares that the customary legal incidents implicit in actions taken by Congress will not be recognized by the courts unless Congress explicitly sets forth such incidents. Such a standard goes beyond judicial construction and comes close to judicial prescription.

ARGUMENT

1. The Cheyenne River Act Is a Law of Special Applicability to the Tribe, in the Nature of the Allotment Acts Discussed in *Montana* and *Brendale*, Codifying a Settlement Agreement With the United States for Conveyance of Land in Exchange for Compensation. The Application of the *Dion* Standard to Specific Settlement Legislation Such As the Cheyenne River Act Is Not Appropriate.

This case presents the question whether the Cheyenne River Sioux Tribe retains the authority to regulate the activities, specifically hunting and fishing, of tribal nonmembers on lands located within the exterior boundaries of the reservation but owned in fee by the United States following the passage of the Cheyenne River Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954). That act was passed pursuant to the policy of the United States government to obtain title to lands located along the Missouri River in an effort to construct flood prevention measures including dams and reservoirs. H.R. Rep. No. 2484, 83d Cong., 2d Sess. 3 (1954).

In 1944, Congress enacted the Flood Control Act, Pub. L. No. 78-534, 58 Stat. 887, which authorized the government to enter into negotiations with landowners for the sale of such lands. (Pet. App. at A9). Under the authority of that Act, Congress passed Pub. L. 81-870, 64 Stat. 1093 (1950) (hereinafter Public Law 870) allowing for specific negotiations with the Cheyenne Sioux River Tribe, pursuant to which the government reached a settlement with the Tribe for the sale of such lands. (Pet. App. at A10). The ultimate agreement was codified in the Cheyenne River Act, and provided for compensation for lands and improvements taken, relocation and rehabilitation

costs, and final settlement of all tribal claims, rights and demands. Pub. L. No. 83-776 (Pet. App. at A196-A200).[1] Importantly, the Act also specified that the agreement was not effective until after acceptance in writing by three-fourths of all the adult tribal members. *Id.* (Pet. App. at A195).

Both Public Law 870 and the Cheyenne River Act are public laws specially applicable to the Cheyenne River Sioux Tribe. This Court previously addressed the impact of laws of special applicability upon a tribe's regulatory power over nonmembers in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

In *Montana*, this Court examined whether the Crow Tribe of Montana had the power to regulate hunting and fishing by nonmembers on reservation lands owned in fee by nonmembers. The Court found that arguably a power to regulate such nonmember activity arises from the power to exclude implicit in treaty provisions establishing reserved lands "set apart for the absolute and undisturbed use and occupation of the Indians."[2] 450 U.S. at 554, 558-59. However, that

[1] Specifically, the Cheyenne River Act provided that with regard to the taken lands, the Tribe retained mineral rights, the right to cut timber, the right to graze animals and the right of access to the reservoir, including the right to hunt and fish, "subject, however, to regulations governing the corresponding use by other citizens of the United States." Pub. L. No. 83-776 (Pet. App. at A201-A205).

[2] Treaty Between the United States of America and the Crow Tribe of Indians (Second Treaty of Fort Laramie), 15 Stat. 649, 650 (1868). The treaty also obligated the United States to restrict passage and residency of nonmembers over and upon the lands. *Id.*

absolute use and occupation was reduced following the passage of the General Allotment Act of 1887, 24 Stat. 388, and the Crow Allotment Act of 1920, Pub. L. No. 66-239, 41 Stat. 751. 450 U.S. at 558-59, which specifically authorized the issuance of fee patents to individual Indians on the reservation, and allowed for the alienation of those lands to non-Indians within 25 years. *Id.* at 548. Recognizing that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands," this Court held that the Tribe possessed no authority to regulate nonmember hunting and fishing on fee lands owned by nonmembers within the reservation. *Id.* at 561.

In *Brendale*, this Court again spoke to the issue of tribal regulatory authority over nonmembers on fee lands, this time within the context of zoning. Applying the same analysis as in *Montana*, the four Justice plurality found that the underlying treaty established the reservation for the "exclusive use and benefit"[3] of the Yakima Indian Nation. 492 U.S. at 422. However, because of the General Allotment Act, discussed *supra*, the Tribe's exclusive use of the fee lands was diminished. *Id.* The plurality agreed with the Court in *Montana* to the effect that the Tribe has no power to regulate the activities of nonmembers on lands from which the Tribe, as a result of specific acts of Congress, no longer has the right to exclude nonmembers. *See id.* at 424-25. This includes zoning as

[3] Treaty Between the United States and the Yakima Nation of Indians, 12 Stat. 951, 952 (1859). The treaty further stipulated that no white man would be permitted to reside upon the reservation without permission from the Tribe. *Id.*

well as hunting and fishing.[4] The opinion of Justices Stevens and O'Connor concluded that "by providing for the allotment and ultimate alienation of reservation land, the [Allotment] Act in some respects diminished tribal authority." *Id.* at 436.

As with the Allotment Acts in *Montana* and *Brendale*, Public Law 870 and the Cheyenne River Act are acts specially addressed to the Tribe itself. Even more than laws specially passed with Indians in mind, however, the Cheyenne River Act is by its very nature an enactment which the Indians themselves played a significant role in shaping; it represents a settlement agreement, *see* Pub. L. No. 81-870 (authorizing "the negotiation and ratification of separate settlement contracts") (Pet. App. at A187); Pub. L. No. 83-776 (describing the enactment as an "agreement between the United States of America and the Sioux Indians of Cheyenne River Reservation") (Pet. App. at A195), reached after several years of bargaining by both the Indians and the federal government, and its implications could not be more apparent. There can be no mistaking that the intent of the Congress, and of the Tribe, was to convey title and ownership of reservation lands to the United States

[4] The Court did reaffirm the two exceptions noted by the Court in *Montana*, that the Tribe does possess the power, derived from its inherent sovereignty, to regulate nonmembers (1) if they have entered into consensual agreements with the Tribe or members of the tribe, or (2) if their activities threaten the welfare or security, or self-government of the Tribe. In those cases, however, consistent with prior precedent, the tribe's authority extends only to civil jurisdiction. *Brendale*, 492 U.S. at 428; *see Montana*, 450 U.S. at 565-66.

in exchange for compensation to the Tribe,[5] and the Act is an obvious codification of the agreement as negotiated and approved by the government and the Indians. Despite the intent expressed in these acts of special applicability, and the obvious parallels between the instant case and *Montana* and *Brendale*, the court of appeals distinguished the latter as decisions founded upon "the intent to destroy tribal government underlying the Allotment Acts," (Pet. App. at A27). Finding no such intent in the Cheyenne River Act, the Eighth Circuit proceeded to construe the Act as if it were a law of general applicability.

The court of appeals applied the standard of *United States v. Dion*, 476 U.S. 734 (1986), a case involving prohibitions of general applicability.[6] *Dion* requires that in order to abrogate an Indian treaty right, there must be clear evidence that Congress was aware of a conflict between its intended action and Indian treaty rights, and that Congress chose to resolve the conflict by abrogation. *Id.* at 739-40. In *Dion*, the Court addressed the question whether the Bald Eagle Protection Act, Pub. L. No. 76-567, 54 Stat. 250 (1940) (codified as amended at 16 U.S.C. §§ 668-668d), abrogated the right of Indians to hunt bald or golden

[5] *See, e.g., Aquisition of Lands and Rehabilitation of Cheyenne River Sioux Reservation, 1954: Hearings on H.R. 2233 and S. 695 Before the Joint Senate and House Subcomm. on Indian Affairs*, 83d Cong., 2d Sess. 10-11 (1954) (Statement of B. Y. Berry, House Subcomm. Chairman) (calling the goal of negotiations "a fair and equitable settlement for the taking of [Indian] lands and properties on the Cheyenne River Reservation").

[6] In its opinion in *Bourland*, the Eighth Circuit focused upon the notion of "abrogation" and applied a *Dion*-style analysis. *See* (Pet. App. at A24-A25, A27, A40).

eagles on reserved lands. While the Court recognized that Indians generally possess the exclusive right to hunt and fish on the lands reserved to them, it noted that Congress retains the right to abrogate rights granted by treaty if it does so expressly. *Id.* at 737-38 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)). The Court found that the Bald Eagle Protection Act is a sweeping act making it a federal crime to take, possess or sell any bald or golden eagle. *Id.* at 740. However, the Act was amended to provide that Indians may obtain a permit allowing them to take such eagles for religious purposes. *Id.* at 740-44. The Court found that this amendment was clear evidence Congress considered the impact of the law upon Indians, and chose to abrogate their general right to hunt such birds, except by permit for religious purposes. *Id.* at 745.

While the *Dion* standard is an appropriate safeguard of Indian treaty rights against unintended dissolution by Congress in the context of the enactment of a law of general applicability, the application of the *Dion* standard to settlement legislation such as the Cheyenne River Act is clearly inappropriate. Application of *Dion* to such legislation carries with it a high likelihood of unraveling of the bargain to the extent that the implications of passages in settlement legislation providing for "complete settlement of all claims, rights, and demands" are not honored by the courts. The approach of the Eighth Circuit creates an impossible standard requiring Congress in settlement legislation involving Indian tribes to inventory all rights and lesser included powers sought to be extinguished or impaired.

2. Neither *Dion* Nor Any Decision of This Court Erects a Standard So High That Congress Will Be Deemed to Have Curtailed an Indian Treaty Right Only if the Legislative Language Speaks Explicitly to the Precise Issue.

The court of appeals has derived from *United States v. Dion*, 476 U.S. 734 (1986), a degree of precision required of Congressional enactments not present in the holding of the case itself. It reads into *Dion* the rule that Congress must "clearly express[] an intent to divest the Tribe of regulatory authority over non-Indian hunting and fishing activity on the taken area." (Pet. App. at A27). This standard, as enunciated by the Eighth Circuit, in effect declares that customary legal incidents implicit in actions taken by Congress will not be recognized by the courts unless Congress explicitly sets forth such incidents. Such a standard goes beyond the requirements of *Dion* and is contrary to the policy of this Court enunciated in *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1986). There the Court rejected a construction adopted by the Ninth Circuit that a state statute must be explicit in order to be applicable to tribal members.

Chemehuevi involved the authority of the state of California to statutorily require tribal members to collect a state excise tax on cigarettes sold on reservation lands to nonmembers. The court of appeals contended that because the statute did not explicitly state that the tax was to be passed on to nonmember end-purchasers, the Tribe was not required to collect such taxes owing to the general prohibition against states attempting to tax tribes or tribal members. *Id.* at 10-11. This Court found that such an express statement was not required, since the legal incidents implicit in the statutory scheme indicated that if the

vendor was untaxable, the ultimate burden implicitly fell upon the non-Indian consumers of cigarettes purchased on Indian territory. Rather, the Court held that fair interpretation of the enactment is required to assess the legal incidents of an enactment. *Id.* at 11-12.

Neither *Chemehuevi* nor *Dion* require that direct implications of Congressional enactments be reflected by the courts. In reflecting such implications, the court of appeals comes close to prescribing an outcome rather than construing a statute.

CONCLUSION

For all the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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